COMPULSORY SALES AND PUBLIC POLICY. — If a farmer covets his neighbor's horse, and the neighbor declines to part with it, no sane system of jurisprudence would think of furnishing the farmer with any legal means of compelling the neighbor to sell against his will. The farmer's only interest in the horse is his desire for it, and this is not of sufficient social importance to warrant legal protection at the expense of the neighbor's equally significant desire to keep it. To such a case the language of the Circuit Court of Appeals, in the case of the *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, is appropriate. Undoubtedly the neighbor might "reject the offer . . . for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern." [1]

Instead of a neighbor with a horse, one may suppose a country store, with a full line of all the necessities and luxuries of life, within convenient reach of the farmer's house. Clearly he has a very real and permanent interest in this store. If he were capriciously and arbitrarily denied access on equal terms with his neighbors, it would be a serious harm, subjecting him to expense and personal discomfort, perhaps even compelling him to seek a home elsewhere. This interest the law seems once to have protected.[2] To-day there is no legal compulsion by which it can be secured. Yet to a large extent social compulsion takes its place. It is not only the carrier, the innkeeper, the purveyor of light and heat, who "takes upon himself a publick employment," and is "bound to serve the publick as far as the employment extends." [3] Where the law is silent, the community, through custom and ethics, shows its expectation that every man who goes into the business of selling to the public for a livelihood shall pursue his calling fairly and without discrimination. Rudolph Jhering has put the matter tersely: "Has the innkeeper a right to refuse the stranger; the shopkeeper, baker, butcher, to refuse the customer; the apothecary, the physician, to refuse the client? Every true man of business feels that he has *not* the right; he is aware that he would suffer in public opinion. Why? . . . Because by the adoption of his particular vocation he has given society an assurance which he is not making good." [4]

One may go a step further. Instead of a village store, take a large manufacturing business, producing a commodity of general consumption, of which it has a substantial monopoly, and for which, by intrinsic merit or judicious advertising, it has created a wide demand. A business man, relying on his ability to purchase this commodity, invests money and enterprise in a retail store, and creates for himself, perhaps at some expense, the reputation of a reliable retailer of such commodities as those of our manufacturer. A capricious refusal on the manufacturer's part to deal with the retailer would subject him to a serious hardship. If other manufacturers of similar commodities followed suit, he might be

[1] 227 Fed. 46, 49. For a statement of the case see 29 HARV. L. REV. 341.

[2] See instances of common employment cited in Adler, "Business Jurisprudence," 28 HARV. L. REV. 135, 149 *ff.*

[3] Chief Justice Holt, in Lane *v.* Cotton, 1 Ld. Raym. 646, 654.

[4] LAW AS A MEANS TO AN END (Modern Legal Philosophy Series, V), p. 108.

ruined. Here there is not always the protection of public opinion, so potent in the case of the country storekeeper. There is the strongest social interest to be secured, and it can be secured without substantial burden on the manufacturer, for to compel him to sell without discrimination would be only to compel him to do what in the general understanding of the business community he has undertaken to do by entering the business. Yet here also the common law, with its stern individualism, has refused to lend its aid.

In a note in a previous issue,[5] discussing the Cream of Wheat case, a method was suggested by which compulsory sales could be effected in such a case, without running counter to any constitutional difficulties. In the Michigan Law Review for January [6] the conclusions reached in that note are vigorously criticized. The writer concedes that the method proposed would in all probability be constitutional, but the policy of the plan is attacked on the ground that it would enable such a company as the plaintiff in the Cream of Wheat case, by selling to the public below cost for the purpose of attracting customers, to "make it impossible for ordinary retailers to carry these goods, . . . thus perhaps demoralizing retail trade, crippling manufacturers, with ultimate approach to, instead of prevention of, monopoly."

The undesirability of such a result may be conceded; but is the result a necessary one? Because a retailer is to be given the power to compel a manufacturer to sell to him without discrimination, it does not follow that he must be allowed to use that power to wreck the retail trade. If price cutting is an evil, it can be prevented, as, for instance, by bringing it within the definition of "unfair methods of competition," prohibited by the Trade Commission Law.[7] And even if statutory enforcement of a price-maintenance system is thought inadvisable, the court or commission charged with the enforcement of a compulsory sales law might well be empowered to refuse relief if the complainant threatens to use his power in an anti-social manner, just as a court of equity now refuses relief if the complainant's conduct is unconscionable.[8] To lay down a flat rule, and enforce it though the heavens fall, smacks of a stage of our law when legal principles had not yet attained diversification, and the science of administration was as yet unborn. As Mr. Justice Holmes has said in another connection, "between the variations . . . that I suppose to exist, and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies the culture of two thousand years." [9]

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[5] 29 HARV. L. REV. 77.

[6] 14 MICH. L. REV. 228.

[7] 38 STATS. AT LARGE, 717, 719. This seems only a phase of the infusion of business morality into law, for which Dean Wigmore has made so powerful a plea. See 10 ILL. L. REV. 178, especially at 186 *ff.*

[8] Thus in Worden *v.* California Fig Syrup Co., 187 U. S. 516, where the owner of a patent medicine asked the court to enjoin the defendant from appropriating his good will by fraudulent advertising, the court denied relief, on the ground that the plaintiff himself was guilty of deceptive advertising.

[9] Leroy Fibre Co. *v.* Chicago, M. & St. P., Ry., 232 U. S. 340, 354.